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In the Supreme Court of the United States

October Term, 1988

FRANK MORGAN,
Petitioner,

versus

DENNIS WHITT, individually and in his official capacity, AND THE TOWN OF LAKE PARK, FLORIDA,
Respondents.

On Writ of Certiorari to the United United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE

Petitioner readopts by reference the Statement of the Case contained in his Petition for a Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

The conflicting statements of the facts contained in the Briefs in Opposition filed by Respondent Town of Lake Park and by Respondent Whitt demonstrate exactly why the Eleventh Circuit was wrong to open up the Record and give Respondents the impression that they had a right to de novo review on appeal. The reexamination and reargument of the facts, including credibility determinations urged in the Briefs for the Town and for Whitt, are better directed to the trial court in a motion for judgment n.o.v., or to the jury itself in a closing statement. The credibility determinations already made by the jury should

not be reargued to an appellate court. It was manifest error for the Court of Appeals in this case to substitute its own view of the facts.

Petitioner feels compelled, however, to point out in the body of the Argument several of the more egregious factual misstatements made by Respondents.

I. THIS COURT'S RECENT DECISION IN HARTE-HANKS COMMUNICATIONS V. CONNAUGHTON CONTROLS THE PETITION FOR CERTIORARI IN THIS CASE AND REQUIRES REVERSAL, OR REMAND TO THE ELEVENTH CIRCUIT.

Since the time Petitioner filed the petition in the instant case, this Court has decided Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 57 U.S.L.W. 4846 (1989). That case controls the instant Petition and requires reversal of the decision below, or, at least, remand to the Eleventh Circuit for reconsideration of its analysis in

light of the Connaughton Court's explanation of First Amendment appellate review.

Though the Town makes no mention of this decision, defendant Whitt acknowledges that Connaughton controls. Response to Petition 14 [hereinafter "Whitt Brief"]. He then wrongly asserts, however, that the Eleventh Circuit somehow complied with the newly announced Connaughton rule. In fact, just the opposite is true. In the instant case, the Court of Appeals reversed the jury's finding of actual malice and falsity even though the record contained ample evidence supporting the finding.

Moreover, the jury's finding was necessarily based on credibility calls; the jury must have believed plaintiff Morgan and disbelieved defendant Whitt. For example, the members of the jury be-

lieved the testimony of Lynn Nyce and others who said Whitt accused Morgan of arson, or "Jewish lightning;" they did not believe Whitt's disavowal (which his counsel are still repeating). The jury believed plaintiff Morgan's testimony that the investigation chilled his freedom of speech.

Finally, the jury ~~be~~lieved the witnesses who testified that the trip had been authorized by the Town Commission; the jury did not believe the self-serving disavowals of any knowledge of the trip. The Petition, and the Briefs of the Town and Whitt display quite well the array of evidence before the jury. The Petition stated that Lynn Nyce testified that Whitt called Morgan "a crook," and that Whitt said "We're going to get enough information on him to put his ass in jail." See Petition 5, and

source cited therein. The Town maintains that Lynn Nyce's testimony exonerated Whitt of any statements regarding arson, see Brief of Respondent Town 11 [hereinafter "Town Brief"]. However, not even Whitt himself so blatantly mischaracterizes Ms. Nyce's testimony; rather, Whitt admits that his insinuations led her to feel "that Morgan was a person that she did not want to know." Whitt Brief 4.

Yet the Eleventh Circuit rejected the jury's findings without discussing the record conflicts or the necessary credibility calls made by the jury, as required by Connaughton and Bose Corp. v. Consumers Union, 466 U.S. 485 (1984). The jury necessarily found that Whitt deliberately set out to make Morgan pay -- by suffering a damaged reputation on unsupported and false allegations -- in

retaliation for Morgan's civic criticisms of Town Manager Whitt. The jury believed those witnesses who testified that Whitt continued to spread baseless accusations even after witness upon witness refused to corroborate them. Such actions constitute actual malice, and the jury so found. And it is the jury's role, not the Court of Appeals', to decide whether certain witnesses are to be believed.

This Court in Connaughton clarified that the jury still has the power to decide record conflicts and credit certain witnesses even in First Amendment cases. The petitioner in Connaughton argued that this Court, in Bose, had indeed rejected the trial court's credibility determination. But the Connaughton Court emphasized: "We disagree with this reading of Bose." 57 U.S.L.W. at 4855 n.35.

Instead, "credibility determinations are reviewed under the clearly erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses. . . .'" 57 U.S.L.W. at 4855, quoting Bose, 466 U.S. at 499-500.

Thus, it is now settled law that a reviewing court should credit those demeanor and credibility inferences which the jury must necessarily have drawn in reaching its verdict, and then compare those accepted findings "alongside the undisputed evidence," 57 U.S.L.W. at 4855, and only then reach an independent conclusion on the actual malice issue.

This Court found: "Accepting the jury's determination that petitioner's explanations for these omissions were not credible, it is likely that the newspaper's inaction was a product of a

deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges." 57 U.S.L.W. at 4856. The parallel to Morgan's case is startling. Whitt similarly failed to seek information vindicating Morgan precisely because Whitt wanted to find a reason to "lock [Morgan's] ass up." Whitt deliberately failed to investigate many sources who would have cleared Morgan. And, even worse than in Connaughton, Whitt continued spreading lies about Morgan even after objective reliable sources, from law enforcement officials to bystanders, provided Whitt with no evidence whatsoever that Morgan had committed arson, or "Jewish lightning."

As in Connaughton, Whitt's continued spewing of bad information in the face of consistent credible denials --

here from third parties, not just Morgan -- necessarily adds up to subjective reckless disregard of the falsity of the allegations. This was not a mere failure to investigate, it was deliberate blinding to truth. "The purposeful avoidance of the truth is in a different category," 57 U.S.L.W. at 4856, and constitutes actual malice if the jury's credibility calls so require.

The Court of Appeals below did not employ this analysis. Rather, it came to its own conclusion on basic facts, inferences, and credibility calls. Its analysis stands contradictory to this Court's framework and application in Connaughton and to the position of other Circuits, as explained in the Petition. See Petition 25-31. Therefore, this Court should grant certiorari to reject the Eleventh Circuit's rule, or should

remand the case in order to allow the Eleventh Circuit to decide the case under a corrected view of its proper appellate role.

II. THE COURT OF APPEALS INCORRECTLY REVERSED THE JURY'S FINDING THAT WHITT ACTED "UNDER COLOR OF" LAW.

The determination of whether an act is taken "under color of" law is a "necessarily fact-bound inquiry." Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982). In the instant case, that issue was resolved against Respondents by the jury. That factual determination should have been respected by the Court of Appeals for the Eleventh Circuit, as it would have been in other circuits. Hence, the incomplete statement of the facts given by Respondents cannot undercut the jury's resolution of the factual issues.

For instance, the Town states that Tice showed his identification only at the request of third parties. See Town Brief 8. Not even Whitt agrees with this characterization; rather, Whitt himself concedes that he told Tice to show his police identification. See Whitt Brief 4. A full report of Tice's statement is provided in the Petition, at 3, 15, and 48.

The evidence before the jury established that Whitt repeatedly bandied about the indicia of his office, including his official business cards. In its finding that Whitt acted "under color of" law, the jury -- like those persons in Pennsylvania visited by Whitt -- found the presence of a Town Police officer, whom Whitt had instructed to show his police identification, to have been significant.

The Eleventh Circuit's outright reversal of this finding by the jury, a finding well-supported by the evidence, amounts to nothing more than an appellate court's usurpation of the function of the Finder of Fact -- in this case, a jury.

In an attempt to distinguish the great weight of authority against their position, see Petition 10-24, Respondents introduce a novel distinction between public officials who act "under color of" law when off-duty within their geographic area, and those who exercise official powers (including the display of indicia of their offices) in a separate geographic area. Town Brief 15-17; Whitt Brief 11-12. Respondents cite no direct support for such a novel distinction, nor could they. Petitioner is unable to locate any case which has made a

distinction between legal jurisdiction and physical jurisdiction for purposes of "under color of" law analysis. Under Respondents' unprecedented approach, no liability could attach where a Town Manager who, while conducting an investigation outside his physical jurisdiction, physically harmed those who failed to provide the information he sought. The distinction urged by Respondents would lead to absurd results. An off-duty police officer who abuses his discretion in his geographic area would be acting "under color of" law, but the same officer would not be acting "under color of" law if, while on-duty and engaged in hot pursuit in a neighboring jurisdiction, he were to shoot an unarmed, suspected misdemeanant fleeing from him. Cf. Tennessee v. Garner, 471 U.S. 1 (1985).

The Town also avers that Petitioner has previously not raised the issue of subterfuge. See Town Brief 4 n.2. A reading of the opening statement by Petitioner's counsel belies that:

> In that capacity, you will hear that on what was a legitimate trip to Syracuse, in which he [Whitt] took Sergeant Tice, an individual the defendant will say is a good honest officer of the Town of Lake Park Police Department, he took him up to Syracuse to do some legitimate business.
>
> However, they didn't fly from West Palm Beach straight to Syracuse and back. There was a secret agenda to this trip that was a personal vendetta, which Defendant Whitt had against Morgan.

R5-10 (opening statement for plaintiff) (emphasis added). Far from being a concession, the initial paragraph could fairly have been taken by the jury to be a prediction by Petitioner's counsel of what the Defendants would assert. The second paragraph clearly laid out the possibility of subterfuge, which the

jury apparently believed to be the situation. Indeed, the jury heard the testimony of Tice that he believed the trip to Syracuse to have been unnecessary. See Petition 2 n.1 and sources cited therein.

III. THE COURT OF APPEALS INCORRECTLY REVERSED THE JURY'S FINDING THAT WHITT'S ACTIONS CONSTITUTED A POLICY OF THE TOWN OF LAKE PARK.

In the instant case, the trial court correctly identified Whitt as a policymaking official. See App. 47 (jury charge). The Eleventh Circuit, however, totally disregarded the district court's legal determination. In so doing, the Eleventh Circuit incorrectly merged into a meaningless mass the distinctly separate issues of "policy" and "under color of" law. See Petition 17-18.

As this Court recently reiterated, "[o]nce those officials who have the

power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue." Jett v. Dallas Independent School District, 109 S.Ct 2702, 57 U.S.L.W. 4858, 4868 (1989), citing Monell v. Department of Social Services, 436 U.S. 658, 661 n.2 (1978) (underlined emphasis in original; bold emphasis added). This is precisely what the district court did in the instant case.

Respondents engage in a futile attempt to downplay the damning evidence utilized by the jury to make its ultimate finding of causation. For example, the Town claims that the judge at trial ruled the existence of the additional airfare to have been "irrelevant to the issue of municipal liability." Town

Brief 23 n.5. That claim is patently wrong. The judge allowed the jury to hear the testimony of the Delta records supervisor regarding the difference in the fares. R6 - 174-81. Furthermore, the language quoted by the Town is the judge's response to an objection made by Petitioner's counsel to the Town's questioning of Whitt as to whether he knew the price differential before his trip. R6 - 515-16. Of course, whether Whitt knew in advance of the differential is a very different issue from whether the Town ratified his action by afterwards paying for the additional airfare. See Petition 2-3, 14-15, 44-45, 48, and 51-53.

Respondents make the basic error of claiming that no "policy" of the Town was demonstrated. See Whitt Brief 17; Town Brief 22. This Court has been

quite clear, however, that "the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers." Pembaur v. Cincinnati, 475 U.S. 469, 483 n.11 (1986). See Oklahoma City v. Tuttle, 471 U.S. 808, 822 (1985) (plurality); id. at 832 (Brennan, J., concurring). In such situations, the decisions of the highest policymakers constitute the "policy," whether or not that policy is contained in an ordinance, personnel manual, or operations guidelines.

Here, Whitt -- the chief administrative and law enforcement officer of the Town of Lake Park -- designed and carried out the Town's of conducting an intrusive investigation into the background of someone who chose to criticize the governance of the Town.

CONCLUSION

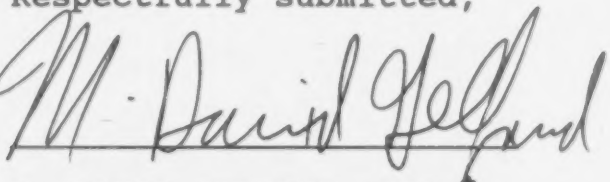
Respondents argue their case by relying upon a set of "facts" never found by the jury in this case. The continuing attempts by Respondents well illustrate the danger posed by an appellate court's interfering with a well-considered jury verdict based, in large part, on credibility determinations.

But for the interference of the Court of Appeals in this case, this Court would not now be faced with the task urged upon it by Respondents -- to delve into each page of a cold Record, and to decide which witnesses to believe and which to disbelieve solely upon the printed word.

If the decision of the Court of Appeals were allowed to stand, as Respondents have urged, this Court and the Courts of Appeals will soon, and fre-

quently, be called upon to act as the thirteenth juror. This Court should reverse the decision of the Eleventh Circuit, and reinstate the judgment of the district court based upon reasonable jury verdicts. Alternatively, this Court should remand this case to the Court of Appeals for reconsideration in light of Connaughton.

Respectfully submitted,

By: 

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